Supreme Court, U.S.
FILED

04 397 SEP 9 - 2004

OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States

FORMER EMPLOYEES OF MARATHON ASHLAND PIPE LINE, LLC,

Petitioners,

v.

ELAINE CHAO, SECRETARY OF LABOR,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

MARIANNE ROWDEN
Counsel of Record
JAMES L. SAWYER
JONATHAN K. BAUM
KATTEN MUCHIN ZAVIS ROSENMAN
525 WEST MONROE STREET
SUITE 1600
CHICAGO, IL 60661
(312) 902-5200

QUESTIONS PRESENTED

1. Whether the Federal Circuit erred as a matter of law by upholding the Secretary of Labor's narrow interpretation of the term "production" under the Trade Adjustment Assistance Act so as to frustrate the Congressional intent of the statute.

2. Whether the Federal Circuit erred as a matter of law by holding that unverified statements made by Petitioners' former employer in an *ex parte* proceeding constitute substantial evidence to support a negative determination under the Trade Adjustment Assistance Act despite the Court of International Trade's finding that Petitioners raised relevant factual issues ignored by Secretary of Labor's investigation.

3. Whether the Federal Circuit erred as a matter of law by not deciding whether the Secretary of Labor's determination under the Trade Adjustment Assistance Act should be accorded deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* or *Skidmore v. Swift & Co.*

4. Whether Labor's failure to conduct an adequate investigation under the Trade Adjustment Assistance Act amounts to an error of law that so frustrates Congress' remedial intent of the Trade Adjustment Assistance Act that Petitioners are entitled to be certified for benefits as a remedy under the statute.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are: Eight Former Employees of Marathon Ashland Pipe Line, LLC, a subsidiary of Marathon Ashland Petroleum LLC, which is a partnership owned by Marathon Oil Company and Ashland Inc. At the time this litigation commenced in 1999, Marathon Oil Company was a subsidiary of USX Corporation, but it became a separate and independent company in 2002.

Respondent is Elaine Chao, United States Secretary of Labor.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding and Rule 29.6 Statement ii

Table of Contents iii

Table of Authorities v

Opinion Below 1

Jurisdiction 1

Statute Involved 2

Statement of the Case 4

Reasons for Granting the Writ 9

I. THIS COURT SHOULD PROVIDE GUIDANCE ON IMPORTANT ISSUES CENTRAL TO ADJUDICATING CLAIMS UNDER THE TRADE ADJUSTMENT ASSISTANCE ACT 9

II. THE FEDERAL CIRCUIT FAILED TO FOLLOW THIS COURT'S PRECEDENT IN REVIEWING DETERMINATIONS BY ADMINISTRATIVE AGENCIES 11

III. THE FEDERAL CIRCUIT'S APPROACH TO REVIEWING THE SECRETARY OF LABOR'S NEGATIVE DETERMINATIONS UNDER THE TRADE ADJUSTMENT ASSISTANCE ACT EFFECTIVELY DENIES A REMEDY TO PETITIONERS 15

Conclusion 16

Appendix 1a

Appendix A - Federal Circuit Order Entering Judgment - 08/05/04 ..... 1a

Appendix B - Federal Circuit Opinion - 6/14/04 ..... 2a

Appendix C – CIT Opinion – 6/11/03 ..... 24a

Appendix D – CIT Remand Opinion – 7/16/02 ..... 53a

Appendix E – Labor's Notice of Negative Determination of Reconsideration On Remand – 10/17/02 ..... 73a

Appendix F – Labor's Notice of Negative Determination Regarding Reconsideration on Remand – 8/20/01 ..... 77a

Appendix G – Labor's Notice of Negative Determination Regarding Application for Reconsideration – 2/11/00 ..... 79a

Appendix H – Labor's Notice of Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance – 12/2/99 ..... 82a

Appendix I – 19 U.S.C. § 2271 (1999) 84a

Appendix J – 19 U.S.C. § 2272 (1999) 85a

Appendix K – 19 U.S.C. § 2395 (1999) 86a

TABLE OF AUTHORITIES

Cases

ABF Freight System, Inc. v. National Labor Relations Board, 510 U.S. 317 (1994) 14

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 13

Former Employees of Barry Callebaut v. Chao, 357 F.3d 1377 (Fed. Cir. 2004) 10

Holly Farms Corporation v. National Labor Relations Board, 517 U.S. 392 (1996) 12

National Relations Board v. Brown, 380 U.S. 278 (1965) 13, 14

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 13

United States v. Mead Corp., 533 U.S. 218 (2001) 13

Statutes

19 U.S.C. § 2271 (1999) 2, 3, 4

19 U.S.C. § 2272 (1999) 2, 3, 4, 9, 10

19 U.S.C. § 2395 (1999) 3, 4, 9

PETITION FOR WRIT OF CERTIORARI

Petitioners, Former Employees of Marathon Ashland Pipe Line, LLC, respectfully petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Federal Circuit, entered June 14, 2004.

OPINION BELOW

The opinion of the Federal Circuit is reported at 370 F.3d 1375 and reproduced in Petitioners' Appendix at 2a.[1] The order entering judgment issued as a mandate on August 5, 2004 reversing the United States Court of International Trade's decision is reproduced in App. at 1a. The redacted versions of the United States Court of International Trade's decisions appear at 277 F.Supp.2d 1298 (Ct. Int'l Trade 2003) and 215 F.Supp.2d 1345 (Ct. Int'l Trade 2002). The full text of the confidential versions of the United States Court of International Trade's decisions and the negative determinations issued by the U.S. Department of Labor are set forth in a separate Supplemental Appendix submitted under seal with this Petition.[2]

JURISDICTION

Judgment of the Federal Circuit was entered on June 14, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

---

[1] References to the Appendix are made by noting "App." and the applicable page number.

[2] References to items in the Supplemental Appendix are also noted as "App." with pagination continuing from the Appendix contained in this Petition. The Supplemental Appendix begins with Appendix C at page 24a.

STATUTE INVOLVED

At the time Petitioners sought judicial review of the Secretary of Labor's negative determination on their petition for benefits, the Trade Adjustment Assistance Act read as follows:

> (a) The Secretary shall certify a group of workers (including workers in any agricultural firm or subdivision of an agricultural firm) as eligible to apply for adjustment assistance under this subpart if he determines -
>
> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.
>
> (b) For purposes of subsection (a)(3) of this section -
>
> (1) The term "contributed importantly" means a cause which is important but not

> necessarily more important than any other cause.
>
> (2)(A) Any firm, or appropriate subdivision of a firm, that engages in exploration or drilling for oil or natural gas shall be considered to be a firm producing oil or natural gas.
>
> (B) Any firm, or appropriate subdivision of a firm, that engages in exploration or drilling for oil or natural gas, or otherwise produces oil or natural gas, shall be considered to be producing articles directly competitive with imports of oil and with imports of natural gas.

19 U.S.C. § 2272 (1999).[3] During the course of this litigation, Congress enacted the Trade Adjustment Assistance Reform Act of 2002, P.L. 107-210, 116 Stat. 933, 944, which made a number of changes to 19 U.S.C. § 2272. Because Congress provided that these changes apply to petitions for certification filed on or after 90 days after August 6, 2002, the revisions to the statute do not affect the Petitioners' claim for benefits under the Trade Adjustment Assistance Act and are not at issue before the Court.

---

[3] Pursuant to Supreme Court Rule 14(1)(f), the full texts of 19 U.S.C. § 2272 as well as 19 U.S.C. §§ 2271 and 2395 appear in the Supplemental Appendix at pages 84a - 87a.

STATEMENT OF THE CASE

Statement of the Facts

Petitioners are former employees of Marathon Ashland Pipe Line LLC, a subsidiary of Marathon Ashland Petroleum, a partnership owned by Marathon Oil Corporation and Ashland, Inc. Petitioners worked as gaugers at the Illinois Basin crude oil field in Bridgeport, Illinois. Gaugers were responsible for performing quality control on the crude oil extracted from the wells to ensure it met the quality standards for purchase. If the gaugers determined the oil was not acceptable for purchase, the oil could not be entered into the pipeline or loaded onto trucks for transport to the Robinson, Illinois refinery location.

In March 1999, Marathon Ashland Petroleum reached an agreement to sell off the subdivision which employed Petitioners. Around the same time as the sale, Marathon announced that it or one of its subsidiaries had reached an agreement to purchase crude oil from overseas sources, including Canada and Mexico. Although Marathon Ashland Pipe Line maintains that the Petitioners lost their jobs due to an asset sale, Petitioners believe that the imports of foreign crude oil contributed importantly to their termination, and thus, entitle them to benefits under the Trade Adjustment Assistance Act.

The Proceedings Below

On October 23, 1999, Petitioners' union filed a petition for trade adjustment assistance with the Department of Labor ("Labor" or "Secretary") under 19 U.S.C. §§ 2271 - 2395. Labor determined that, as gaugers employed by a pipeline carrier, their services did not constitute production of an article as required by Section 222 of the Trade Act of 1974

(19 U.S.C. § 2272) and therefore, Petitioners did not qualify for trade adjustment assistance. The Secretary further determined that their separation was not "caused importantly" by a reduced demand for services from a parent firm. App. at 82a.

On December 16, 1999, Petitioners requested a reconsideration of the negative determination. Labor denied the request for administrative review. App. at 79a. On January 24, 2001, Petitioners filed their Motion for Judgment on the Administrative Record with the United States Court of International Trade ("CIT"). On August 7, 2001, Labor sought a voluntary remand, because it had failed to conduct a complete investigation. App. at 77a. The Secretary affirmed Labor's negative determination of eligibility for trade adjustment assistance benefits for the former workers of Marathon Ashland Pipe Line, LLC. App. at 77a. The Petitioners again sought judgment upon the agency record through statutory review by the CIT.

On July 16, 2002, the CIT held that: (1) Labor's determination that employees did not "produce" an article within the meaning of the Trade Adjustment Assistance Act, and the resulting denial of certification for trade adjustment assistance, were not supported by substantial evidence, and (2) Labor's investigation fell below threshold requirements of reasonable inquiry, necessitating remand for further investigation into Marathon Oil's imports and the reasons behind the sale of the company's assets. The CIT ordered Labor to provide an explanation of its analysis used to determine that the Petitioners' work as gaugers did not constitute "producing" an article within the meaning of Section 2272 and review how the gaugers' duties fit into the oil production scheme of the parent company. Labor was also directed to further investigate whether the workers were eligible for certification as "service" workers. App. at 66a.

On remand, Labor obtained additional information from Marathon Ashland Pipe Line regarding the firm's business and the former employees' duties. The agency again concluded that the former employees were not eligible for assistance due to the gauger's failure to "produce" an article. App. at 75a. Labor determined that, since the gaugers were employed by a pipeline company and were merely responsible for certifying the quality and quantity of crude oil being shipped to customers, they were not engaged in activities related to the exploration or production of crude oil. Labor further determined that the asset sale of Scurlock Permian LLC, a crude oil gathering and transportation subdivision of Marathon Ashland Pipe Line, was part of an overall sale of assets by Marathon Ashland Petroleum, LLC, because they were not of value to the company nor related to increased imports. App. at 76a. Based on Labor's negative determination on remand, Petitioners again sought judicial review at the CIT seeking certification for trade adjustment assistance.

On June 11, 2003, the CIT held that Labor failed to follow its remand instructions and held that Labor's denial of Petitioners' request for certification for trade adjustment assistance was not supported by substantial evidence and not in accordance with law. The CIT determined that Labor ignored the issue of whether Marathon Oil's decision to purchase crude oil imported from Mexico and Canada resulted in the sale of company assets. App. at 25a, 47a – 48a. According to the CIT, Labor should have conducted a thorough investigation to fully assess the Marathon Oil human resource representative's information and the Petitioners' claim. App. at 49a. The record contained only two exchanges of letters with company officials and two press releases announcing the sale. Moreover, the letters from Marathon Ashland Pipe Line does not indicate whether the asset sale is unrelated to any decision to import of crude oil. App. at 48a –

49a. As a result of Labor's failure to conduct a full and adequate investigation of Petitioners' claim, the CIT granted Petitioners' motion for judgment on the agency's record and ordered Labor to certify Petitioners as eligible for trade adjustment assistance. Labor appealed the CIT's decision to the U.S. Court of Appeals for the Federal Circuit.

The Federal Circuit's Decision

The United States Court of Appeals for the Federal Circuit ("Federal Circuit") reversed the CIT's ruling which required Labor to certify Petitioners for trade adjustment assistance. The opinion by the Federal Circuit concludes that while the definition of the statutory term "production" is a question of law, the question whether particular employees are engaged in "production" within that definition is factual.

The Federal Circuit determined that it was reasonable, given that the Petitioners worked as gaugers for Marathon Ashland Pipe Line and performed tasks to interface between production and transportation, for Labor to conclude that the gaugers were not involved in the production process, but instead were serving as buyers' agents ensuring that the quantity and quality of the product were consistent with the terms of the proposed sale. App. at 17a.

The Federal Circuit's second ground for reversal was based on its determination on the 1988 amendments to the Trade Adjustment Assistance Act were intended to enlarge a restricted interpretation of what it means to produce oil, and Congress intended to extend the definition of production to include activities such as gauging. App. at 16a. However, the Federal Circuit stated that the legislative history shows that the 1988 amendments were intended only to effect a limited expansion of the definition of production, extending eligibility only to workers and firms engaged in exploration and drilling.

App. 17a – 19a. The Federal Circuit interpreted the House Conference Report to reach the conclusion that the purpose of the amendment was to address the discrepancy in law, whereby workers employed by firms only engaged in exploration or drilling crude oil and natural gas have been denied program benefits while workers engaged in exploration or drilling for firms that also produce crude oil and natural gas are eligible to apply for such benefits.

The Federal Circuit relied on Section 1421(b) of the 1988 Act as additional support for Labor's determination that "production" was not intended to be read broadly to encompass work consisting of providing essential goods and services for the production of articles. Section 1421(b) extended adjustment assistance not only to workers in firms that produce goods that compete with imported goods but also to workers in any firm that "provides essential goods or essential services" for the production of such goods, but this section never became effective. App. at 19a – 20a.

The Federal Circuit also determined that Labor was entitled to base its negative determination on statements from company officials if the Secretary reasonably concluded that those statements were creditworthy and were not contradicted by other evidence. App. at 22a. According to the Federal Circuit, Petitioners did not point to any evidence that contradicted the factual characterizations of their role in the process set forth in statements by representatives of Marathon Ashland Pipe Line.

Since the Federal Circuit reversed the CIT's ruling that Labor's negative determination was not supported by substantial evidence, it did not address the government's argument that the CIT lacked authority to direct the Secretary to certify Petitioners as eligible for trade adjustment assistance. App. at 23a.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD PROVIDE GUIDANCE ON IMPORTANT ISSUES CENTRAL TO ADJUDICATING CLAIMS UNDER THE TRADE ADJUSTMENT ASSISTANCE ACT.

When reviewing a negative determination issued by the Secretary of Labor under the Trade Adjustment Assistance Act, courts must follow federal statute which states that Labor's findings of fact (*e.g.*, whether displaced employees are involved in "production") are conclusive provided they are supported by substantial evidence.[4] 19 U.S.C. § 2395(b). However, the statute also provides that for good cause, a court may remand the case back to the Secretary to develop further evidence. *Id.* Petitioners seek this Court's review of the case at bar to address the central issue of whether Labor, as the agency charged with administering the Trade Adjustment Assistance Act, must define the term "production" under § 2272 in order to properly adjudicate Petitioners' claim for benefits and effectuate Congress' intent of enacting the Trade Adjustment Assistance Act.

The case at bar is typical of a growing number of cases in which the CIT has remanded the determination back to the Secretary multiple times because Labor failed to conduct an adequate investigation with utmost regard for displaced workers' interests, and because the investigation failed to meet a "threshold requirement of a reasonable inquiry."[5] App.

---

[4] The CIT interpreted substantial evidence as "more than a mere scintilla" of evidence that would reasonably support a conclusion. App. at 59a.

[5] The number of cases subject to numerous remands because of erroneous negative determinations by Labor has been monitored by the AFL-CIO and highlighted in its recent report, *Breaking Faith with*

at 28a. *See Former Employees of Barry Callebaut v. Chao*, 357 F.3d 1377 (Fed. Cir. 2004). Petitioners in this case endured four denials of their claim since originally filing for assistance in 1999, clearly violative of the statute's remedial intent. Multiple determinations (and judicial reviews) would be eliminated if the Court provides guidance to Labor concerning its interpretation of the Trade Adjustment Assistance Act. Failure to do so would result in the continued inadequacy of Labor's adjudication of workers' claims for benefits.

Congress delegated Labor as the finder of fact in determining whether a petitioner is covered by the Trade Adjustment Assistance Act. As a result, Labor is required to make an adjudication on a case-by-case basis to determine whether displaced workers in each specific circumstance meet the statutory criteria for trade adjustment benefits under 19 U.S.C. § 2272.

To understand the subjective nature of Labor's fact finding determination, in the opinion below, the Federal Circuit compared the eligibility of gaugers for trade adjustment benefits in two different settings. The court stated that gaugers who test oil before it is placed on the market and are employed by an independent oil producer could be reasonably characterized as "production workers." App. at 16a. Conversely, the Federal Circuit noted that gaugers employed by a pipeline company testing oil offered for purchase to ensure quality and quantity may be considered part of the purchase and transportation process, rather than the production process and not eligible for trade adjustment benefits. App. at 16a – 17a. Nonetheless, the Federal Circuit stated that the work performed by these gaugers would be

---

Workers: The Bush Labor Department's Improper Denials of Trade Adjustment Assistance, published as an Issue Brief (July 2004).

identical, but their eligibility for trade benefits would be contingent upon how Labor characterized the gaugers' employer (*i.e.*, oil producer or transportation company). App. at 16a. Such a result is arbitrary and capricious, and only serves to frustrate Congressional intent to provide remedial benefits for those workers that have lost their job due to increased imports and foreign competition.

This case is one of first impression for the Court involving the judicial review of a negative determination by the Secretary of Labor concerning a claim by displaced workers seeking benefits under the Trade Adjustment Assistance Act. Because of increased displacement of workers and additional trade liberalization, Congress sought to expand the groups covered by the Trade Adjustment Assistance Act. In the Trade Adjustment Assistance Reform Act of 2002, Congress added farmers to the workers eligible for trade adjustment benefits. *See*, P.L. 107-210, 116 Stat. 933 (August 6, 2002). As a result, it is likely the Court will continue to receive petitions from displaced workers denied benefits unless the Court provides guidance concerning a reasoned analysis for judicial review of the Secretary's adjudication of these claims.

II. THE FEDERAL CIRCUIT FAILED TO FOLLOW THIS COURT'S PRECEDENT IN REVIEWING DETERMINATIONS BY ADMINISTRATIVE AGENCIES.

The Federal Circuit reversed the CIT's decision based on its approach to Labor's analysis of "production" – the key term in that statute in which Congress has delegated to the Secretary the authority to certify workers separated from their

jobs where production has decreased.[6] After acknowledging that the definition of "production" is a question of law, the Federal Circuit ruled that Labor's factual determination that Petitioners were merely "buyer's agents" was reasonable based on "substantial evidence" consisting of questionnaire responses by Marathon Ashland Pipe Line. Specifically, the Federal Circuit held that:

> The Secretary [of Labor] did not explicitly construe the term "production" in the adjustment assistance statute, but instead merely concluded that the plaintiff employees, and thus their firm, were not involved in the production of crude oil. In any event, regardless of whether it is appropriate to accord Chevron or Skidmore deference to an unarticulated, implicit construction of the term "production," that issue has no effect on the disposition of this case, because we would reach the same result in this case with or without deference.

App. at 16a, n. 2. Apparently, the Federal Circuit believes that the Secretary of Labor was only required to make a determination that Petitioners worked as gaugers for a transportation company, which by its nature could not be engaged in the production of oil, without regard to the level of deference that should be accorded to Labor's factual determination. *See Holly Farms Corporation v. National Labor Relations Board*, 517 U.S. 392, 400 – 403 (1996).

---

[6] The CIT, on the other hand, ordered Labor to define the term "production" within the context of the oil and gas industry. Labor repeatedly failed to do so and the CIT ultimately ordered certification of the Petitioners for trade adjustment benefits. App. at 33a – 34a.

On numerous occasions, this Court has visited the issue of whether a federal administrative agency has properly interpreted a statute that Congress has delegated to the agency to administer. Beginning with *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court has made clear that where Congress has not directly addressed the question at issue, either explicitly or implicitly, the role of the court is to determine whether the agency's interpretation is based on a permissible construction of the statute. 467 U.S. at 843. The Court has refined its analysis for deference where Congress has not conferred authority to issue rules or regulations, holding that the agency determination should be accorded deference based on its persuasiveness under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See United States v. Mead Corp.*, 533 U.S. 218 (2001).

The Court has addressed statutory schemes similar to the Trade Adjustment Assistance Act. In *National Labor Relations Board v. Brown*, 380 U.S. 278 (1965), the Court reviewed an enforcement order of the National Labor Relations Board relating to unfair labor practices and addressed whether an appeals court exceeded its authority by setting aside a decision within the expert judgment of the National Labor Relations Board. In addressing the power of federal courts in reviewing the decision of an administrative agency with fact finding authority, the Court ruled:

> Courts are expressly empowered to enforce, modify or set aside, in whole or in part, the Board's orders, except that the findings of the Board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. . . . Courts should be 'slow to overturn an administrative decision,' . . . but they are not

> left 'to 'sheer acceptance' of the Board's conclusions,' . . . . Reviewing courts are not obligated to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions. Of course, due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole.

380 U.S. at 291 (citations omitted). Petitioners believe that the reasoning of the Court in *Brown* applies to the central issue of Labor's statutory construction of the term "production" as it applies to Petitioners' claim for trade adjustment benefits and the scant record developed to support Labor's negative determination.

In this case, the Federal Circuit erred by short-circuiting an appropriate analysis of whether the Secretary of Labor's determination was based on substantial evidence because it simply accepted Labor's finding that Marathon Ashland Pipe Line was only a transportation company without evaluating the persuasiveness of Labor's conclusions or their basis in substantial evidence in the administrative record. Therefore, this Court should articulate an appropriate level of deference for the case-by-case analysis required for judicial review of determinations made under the Trade Adjustment Assistance Act. *See ABF Freight System, Inc. v. National Labor Relations Board*, 510 U.S. 317, 323 – 324 (1994).

III. THE FEDERAL CIRCUIT'S APPROACH TO REVIEWING THE SECRETARY OF LABOR'S NEGATIVE DETERMINATIONS UNDER THE TRADE ADJUSTMENT ASSISTANCE ACT EFFECTIVELY DENIES A REMEDY TO PETITIONERS.

Despite the numerous relevant factual issues raised by Petitioners, which Labor failed to address as instructed by the CIT on repeated remand, the Federal Circuit held that Petitioners did not offer evidence about their work as gaugers for a transportation company to rebut Labor's conclusions. App. at 22a. Petitioners believe that as gaugers they were quality control personnel who were essential to the oil production process. Absent the gauger's approval of the oil quality, no product was sold to customers or transported to a refinery. Petitioners sought, and the CIT ordered, Labor to make a factual determination of whether Petitioners were "production" workers based on their role in the unique aspects of the oil industry. Because the Secretary of Labor conducts an *ex parte* investigation with the former employer *on behalf of* the displaced workers, it is difficult for Petitioners to understand what additional evidence they could offer to rebut the presumption by Labor that gaugers working for a pipeline company were necessarily transportation workers not engaged in the production of oil. As a result, Petitioners believe that the Federal Circuit has raised the burden of a rebuttable presumption so high, that no displaced workers will be able to present evidence to set aside a negative determination made by the Secretary of Labor under the Trade Adjustment Assistance Act.

Congress passed the Trade Adjustment Assistance Act as a remedial statute to provide benefits to workers displaced by trade liberalization and constructed a statutory scheme permitting judicial review of the Secretary's factual

determination. Based on the Federal Circuit's opinion in the case at bar, the court has set too low a threshold for the Secretary of Labor to meet its statutory mandate, to make a factual finding based on substantial evidence. As a result, the court has effectively denied a remedy to Petitioners because it is unclear how they could overturn the Secretary's negative determination under the Trade Adjustment Assistance Act as interpreted by the Federal Circuit.

CONCLUSION

The petition for writ of *certiorari* should be granted for the foregoing reasons.

Respectfully Submitted,

Marianne Rowden
Counsel of Record
James L. Sawyer
Jonathan K. Baum
Katten Muchin Zavis Rosenman
525 West Monroe Street
Suite 1600
Chicago, IL 60661
(312) 902-5200

APPENDIX A

United States Court Of Appeals for the Federal Circuit

03-1556

FORMER EMPLOYEES OF MARATHON ASHLAND PIPE LINE LLC,

Plaintiffs-Appellees,

v.

ELAINE CHAO, Secretary of Labor,

Defendant-Appellant.

JUDGMENT

Appeal from the United States Court of International Trade in case no. 00-04-00171, Judge Judith M. Barzilay.

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

REVERSED

ENTERED BY ORDER OF THE COURT

DATED: June 14, 2004 /s/ Jan Horbaly

Jan Horbaly, Clerk

ISSUED AS A MANDATE: AUG – 5 2004

APPENDIX B

United States Court of Appeals for the Federal Circuit

03-1556

FORMER EMPLOYEES OF MARATHON ASHLAND PIPE LINE, LLC,

Plaintiff-Appellee,

v.

ELAINE CHAO, Secretary of Labor,

Defendant-Appellant.

Marianne Rowden, Katten Muchin Zavis Rosenman, of Chicago, Illinois, argued for plaintiff-appellee. With her on the brief was James L. Sawyer.

Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellant. With her on the brief were Peter D. Keisler, Assistant Attorney General; and David M. Cohen, Director.

Appealed from: United States Court of International Trade

Judge Judith M. Barzilay

United States Court of Appeals for the Federal Circuit

03-1556

FORMER EMPLOYEES OF MARATHON ASHLAND PIPE LINE LLC,

Plaintiffs-Appellees,

v.

ELAINE CHAO, Secretary of Labor,

Defendant-Appellant.

DECIDED: June 14, 2004

Before LOURIE, CLEVENGER, and BRYSON, Circuit Judges.

BRYSON, Circuit Judge.

This is a government appeal from an order of the Court of International Trade. The trial court directed the Secretary of Labor to certify eight former employees of Marathon Ashland Pipe Line LLC as eligible for statutory benefits that are available to employees who lose their jobs because of competition from imported goods. Because we conclude that substantial evidence supports the Secretary's determination that the former employees were not engaged in the production of crude oil, we reverse the trial court's ruling to the contrary.

I

Marathon Ashland Pipe Line is a subsidiary of Marathon Ashland Petroleum LLC, which is a partnership owned by Marathon Oil Company and Ashland Inc. The eight former employees worked as "gaugers" for Marathon Ashland Pipe Line. In that capacity, they were responsible for performing quality control on crude oil that was purchased from independent crude oil producers in the Illinois Basin oil field in Bridgeport, Illinois. Their main responsibility was to test the crude oil that had been gathered from the independent producers and stored in tanks. Once the crude oil was tested and verified for quality, it would be released for shipment to third-party purchasers or to the parent company's refinery in Robinson, Illinois.

In 1999, the division of Marathon Ashland Pipe Line for which the employees worked was sold. As a result of the sale, the eight employees lost their jobs. Because the sale occurred close in time to announcements that Marathon undertook to purchase crude oil from outside the United States, the employees contended that Marathon's increased importation of foreign crude oil contributed to the loss of their jobs.

Members of the employees' union filed with the United States Department of Labor a petition seeking benefits for the employees under chapter 2 of title II of the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 2019-30 (1975) (codified as amended at 19 U.S.C. §§ 2271-2395 (2000)). That statute provides that workers who lose their jobs because of competition from imported goods may be eligible for certain monetary, training, and employment service benefits, referred to collectively as "adjustment assistance." The statute assigns to the Secretary of Labor the responsibility to certify workers as eligible for adjustment assistance if the

Secretary determines that a significant number of workers in a firm or subdivision have lost their jobs because of competition from imported goods and if certain other criteria are met. 19 U.S.C. § 2272 (2000).

The petition asserted that the employees lost their jobs because their employer's parent company increased its importation of crude oil and converted its Robinson, Illinois, refinery to process the imported crude oil, thereby reducing its need for crude oil from the Illinois Basin oil field. In response to the petition, the Secretary of Labor conducted an investigation, which consisted mainly of sending an inquiry to Marathon Ashland Pipe Line's human resources representative asking for information regarding the firm's organizational structure, sales, production, employment, and imports.

In December 1999, the Secretary issued a negative determination, in which the Secretary concluded that the employees were not eligible for adjustment assistance. In the denial notice accompanying the decision, the Secretary explained that the petitioning employees were not eligible for adjustment assistance because their company performed a service, namely "transporting crude oil and petroleum products via pipeline," rather than producing an article, as required by the statute. The Secretary explained that the employees of Marathon Ashland Pipe Line would be eligible for adjustment assistance only if "their separation was caused importantly by a reduced demand for their services from a parent firm, a firm otherwise related to the subject firm by ownership, or a firm related by control." In addition, the Secretary stated, "the reduction in demand for services must originate at a production facility whose workers independently meet the statutory criteria for certification and the reduction must directly relate to the product impacted by imports."

According to the Secretary, those conditions were not met for the employees on whose behalf the petition had been filed.

The employees requested reconsideration of the Secretary's noncertification decision, pointing out that in their capacity as gaugers they tested the crude oil produced by independent producers in the Illinois Basin field before it was transported in the Marathon Ashland pipeline. They also noted that the crude oil acquisition department of the parent company, Marathon Oil Company, worked directly with the gaugers in setting the parameters for the acceptance or rejection of the crude oil that was to be transported either to the Marathon refinery or to third-party purchasers. Finally, they argued that the employees' layoffs had been caused by a reduced demand for services by the parent company and that the employees qualified for adjustment assistance on that ground as well.

The Secretary denied reconsideration. The Secretary noted that amendments to the adjustment assistance statute made in 1988 extended the Act's coverage to workers engaged in exploring and drilling for crude oil and natural gas, but not to workers engaged in transporting crude oil or natural gas after its extraction. Reiterating the finding that the employees provided a service and did not produce an article, the Secretary explained that service workers may be certified for adjustment assistance "only if there is a reduced demand for their services from a parent firm, a firm otherwise related to the subject firm by ownership, or a firm related by control." Although some workers in the parent company, Marathon Oil Company, had been certified as eligible for adjustment assistance, the Secretary stated that the employees' firm, Marathon Ashland Pipe Line, did not serve the facilities where workers had been certified. Finally, the Secretary explained that the investigation had shown that the employees' separations were the result of the sale of firm

assets, not the result of a reduction in demand for their services originating at a related company's production facility.

The employees sought judicial review of the Secretary's negative determination by commencing a civil action in the United States Court of International Trade pursuant to 19 U.S.C. § 2395(a). After the employees moved for judgment on the administrative record, the Secretary sought and obtained a voluntary remand to conduct a further investigation into whether the employees had supported crude oil production activities of Marathon Ashland Pipe Line's parent company, Marathon Oil Company. After a further inquiry to Marathon Ashland Pipe Line, the Secretary again denied the petition for adjustment assistance. The Secretary stated that the remand investigation had revealed that during the pertinent period, Marathon Ashland Pipe Line had transported crude oil that Marathon Oil Company and Marathon Ashland Petroleum had purchased from independent Illinois Basin producers, but that Marathon Ashland Pipe Line had not transported crude oil extracted by the parent company, Marathon Oil Company. For that reason, the Secretary concluded that the employees had not supported crude oil production of the parent company, Marathon Oil Company.

The employees then renewed their statutory review action before the Court of International Trade. After further briefing, the court ruled that the Secretary's decision was not supported by substantial evidence. Former Employees of Marathon Ashland Pipeline, LLC v. Chao, 215 F. Supp. 2d 1345 (Ct. Int'l Trade 2002). The court determined that the Secretary had not conducted a reasonable inquiry because "the administrative record provides limited information discussing whether the Plaintiffs' duties as gaugers place them within the group of eligible import-impacted employees Congress intended to benefit" from adjustment assistance and that the

Secretary "fail[ed] to offer any explanation of the analysis used to determine that Plaintiffs' work as gaugers did not constitute 'producing' an article within the meaning of Section 2272." The court also determined that it was improper for the Secretary to rely entirely on representations by Marathon Ashland Pipe Line because "evidence presented by the petitioning workers stating that they were involved in more than the mere transportation of crude oil, directly contradicts the company officials' conclusions." The court further concluded that "[b]y failing to give a reasoned analysis for its determination that the gaugers did not participate in production, Labor neglected its duty to interpret the meaning of 'production' under Section 2272."

Even assuming that the employees were service rather than production workers, the court ruled that the Secretary failed to investigate whether they were qualified for adjustment assistance on the ground that there was a "causal nexus" between increased imports and the loss of their jobs. Finally, the court determined that the Secretary "ignored the issue of whether Marathon Oil's decisions to purchase crude oil imported from Mexico and Canada resulted in the sale of company assets."

The court remanded the matter to the Secretary "for further examination into whether the petitioning employees 'produce' an 'article' within the meaning of the Act, and whether a causal nexus exists between service provided by Marathon Ashland Pipe Line, LLC and production of an import-impacted article by Marathon Oil." The court also directed that "[i]n order to fulfill its duty to conduct an investigation with the utmost regard for the petitioning workers, Labor should conduct a thorough investigation to fully assess both [Marathon Ashland Pipe Line's human resources representative's] information and Plaintiffs' claims."

On remand, the Secretary sought further information from Marathon Ashland Pipe Line about the firm's business and the former employees' duties. Based on the reply, the Secretary again determined that the employees were not eligible for adjustment assistance. The Secretary found that Marathon Ashland Pipe Line is a common carrier pipeline company that provides a service by transporting crude oil and petroleum products, and that the employees "were primarily responsible for activities related to the transportation of crude oil produced in Southern Illinois/Indiana via Marathon Ashland Pipe Line LLC pipelines." As gaugers, the Secretary found, the employees were responsible for quality control; in particular, it was their responsibility to collect representative samples of the crude oil that had been extracted by the independent producers and stored in tanks at the oil fields, and to test the samples and certify that the crude oil was acceptable for purchase. After certifying the quality of the crude oil, the gaugers would verify the quantity of the product in the tank and authorize delivery of the crude oil into the Marathon Ashland Pipe Line. According to the Secretary, the gaugers' functions "were related to ensuring that crude oil purchasers received the quality and quantity of crude oil they were purchasing." As such, the Secretary found, the gaugers were not engaged in activities related to the exploration for or production of crude oil.

In addition, based on Marathon Ashland Pipe Line's representations the Secretary determined that the division for which the employees worked was sold as part of an asset sale because it was not of strategic value to the parent company. The Secretary also found that Marathon Ashland Pipe Line was still transporting crude oil obtained from the Illinois Basin producers, but that other companies were gauging the crude oil and transporting it from the wellhead to the Marathon Ashland Pipe Line facilities. The Secretary therefore concluded that the employees had lost their jobs

because of the asset sale, not because of Marathon's decision to import crude oil.

Finally, the Secretary concluded that because the employees "were engaged in a service," they could not be certified for adjustment assistance "since they were not in direct support of [an adjustment assistance] certified facility during the relevant period." In that regard, the Secretary noted that the refinery that was the destination for much of the crude oil transported by Marathon Ashland Pipe Line was not under an existing adjustment assistance certification during the relevant period.

The Court of International Trade reviewed the Secretary's remand findings and again concluded that the Secretary's negative determination was not supported by substantial evidence. Former Employees of Marathon Ashland Pipeline, LLC v. Chao, 277 F. Supp. 2d 1298 (Ct. Int'l Trade 2003). The court regarded the question of statutory eligibility for adjustment assistance as turning on whether the gaugers were engaged in "production" or not, a question that the court held the Secretary had not adequately addressed. Upon analysis of the gaugers' responsibilities in the context of the crude oil production process, the court concluded that the gaugers were engaged in the production of crude oil. In reaching that conclusion, the court relied on various sources, including a Department of Labor publication that listed gaugers in the category of "production occupations." In addition, the court concluded that crude oil "does not 'exist' as a 'commodity' until after the gaugers perform their job" because crude oil is not sold or transported until after the gaugers evaluate its quality. Thus, the court ruled that the production of crude oil includes all activities that precede the point at which the crude oil enters the stream of commerce, i.e., all work done "by workers who act prior to the time the oil is transported."

The court then looked to the legislative history of section 2272, and in particular the 1988 amendments to that provision. The court noted that the 1988 amendments were intended to expand the definition of crude oil production to encompass exploration and drilling. In light of the congressional purpose to expand the definition of "production" within the oil industry, the court concluded that the term "production" should be understood to encompass other oil industry employees, such as gaugers.

The court next addressed and rejected the Secretary's conclusion that the importation of crude oil had not caused the employees to lose their jobs. On that issue, the court held that the plaintiffs had alleged that the Robinson, Illinois, refinery had been converted to enable it to refine foreign oil having a higher sulfur content and that the Secretary had not investigated that allegation or addressed it in any of the negative determinations. For that reason, the court concluded that "no evidence exists in the record to support Labor's conclusion that the gaugers' termination was not the result of a decision by Marathon to import crude oil."

With regard to the proper remedy, the court concluded that "[n]othing in the record indicates that Labor has the resources or willingness to conduct an investigation beyond making inquiries of [Marathon Ashland Pipe Line]." The court accordingly saw "little benefit to be gained by an additional remand." Instead, the court ordered the Secretary, without further proceedings, to certify the employees as eligible for adjustment assistance benefits.

II

In appealing from the decision of the Court of International Trade directing the Secretary of Labor to certify the employees as eligible for adjustment assistance, the

government makes two arguments. First, the government argues that the court improperly overturned the Secretary's finding that the employees provided a service and did not "produce" crude oil.[1] Second, the government argues that the court exceeded its reviewing authority under 19 U.S.C. § 2395 by directing the Secretary to certify the employees for adjustment assistance.

At the time the eight employees of Marathon Ashland Pipe Line lost their jobs, the statute that governed worker eligibility for adjustment assistance provided as follows:

> § 2272. Group eligibility requirements; agricultural workers; oil and natural gas industry
>
> (a) The Secretary shall certify a group of workers (including workers in any agricultural firm or subdivision of an agricultural firm) as eligible to apply for adjustment assistance under this subchapter if he determines--
>
> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,

[1] The government has not challenged the portion of the court's ruling rejecting the Secretary's finding that the imports of crude oil did not contribute significantly to the employees' loss of their jobs. We therefore do not address that issue.

(2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and

(3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

(b) For purposes of subsection (a)(3)--

(1) The term "contributed importantly" means a cause which is important but not necessarily more important than any other cause.

(2) (A) Any firm, or appropriate subdivision of a firm, that engages in exploration or drilling for oil or natural gas shall be considered to be a firm producing oil or natural gas.

(B) Any firm, or appropriate subdivision of a firm, that engages in exploration or drilling for oil or natural gas, or otherwise produces oil or natural gas, shall be considered to be producing articles directly competitive with imports of oil and with imports of natural gas.

19 U.S.C. § 2272 (2000).

Section 2272(a)(3) provides that in order for a worker to be eligible for adjustment assistance, the worker's firm or

an appropriate subdivision of that firm must be engaged in the production of articles. In the trial court and on appeal, the parties have addressed that statutory issue by focusing on whether the employees in this case were engaged in work that constituted the "production" of crude oil. The employees argue that if they were engaged in the production of crude oil, their employer was necessarily engaged, at least in part, in the production of crude oil, even though much of the employer's work may not have involved production.

The Secretary determined that the employees in this case were engaged in the transportation of crude oil, not the production of crude oil. The Secretary based that conclusion on her finding that the employees tested oil that had already been produced by independent operators and that the testing was conducted incident to the transportation of the oil to the Robinson, Illinois, refinery or to third-party purchasers. The Court of International Trade, by contrast, concluded that gauging activity in general constitutes a part of the process of producing crude oil, and that the production process for crude oil ends after the crude oil has been extracted and tested, and only when it is transported to purchasers. The court's decision was based on two grounds: first, that the quality control work done by gaugers is an essential part of the process of producing crude oil; and second, that the 1988 amendments to the adjustment assistance statute were intended to broaden the meaning of "production" as applied to the production of crude oil and that the term accordingly must be extended to include the work performed by gaugers.

We conclude the trial court erred in its approach to the "production" issue. While the definition of the statutory term "production" is a question of law, the question whether particular employees are engaged in "production" within that definition is factual. In the case of crude oil, the parties agree that production includes all the steps incident to extracting the

oil from the ground, while transportation of the oil includes all the steps incident to moving the oil to the refinery where it will be converted to finished petroleum products. As is commonly the case with integrated processes, however, the general definitions of production and transportation do not necessarily answer the question whether a particular employee who performs tasks at the interface between the two processes is involved in production or transportation. Instead, in such instances the question whether a particular employee's functions are properly characterized as part of the process of production or part of the process of sale and transportation will necessarily depend on the particular facts of the case, such as how the sale and transportation transactions were arranged and whether the employees were serving as agents of the producer/seller or of the purchaser or transporter.

In this case, the Secretary found that the gaugers were employed by the transportation company, which was not affiliated with the producers, and that the gaugers' role was to test the stored crude oil on behalf of the purchasers to determine its quantity and quality. Under those circumstances, it was reasonable for the Secretary to conclude that the gaugers were not involved in the production process but instead were serving as buyers' agents ensuring that the quantity and quality of the produced product were consistent with the terms of the proposed sale.[2]

---

[2] The government argues that we should defer to the Secretary's position in this case pursuant to Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Chevron deference, however, is applicable only when it appears "that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." United States v. Mead Corp., 533 U.S. 218, 226-27 (2001). Where that standard is not satisfied, only the lesser deference accorded under Skidmore v. Swift & Co., 323 U.S. 134 (1944), is

Contrary to the view of the trial court, the fact that part of the gaugers' responsibility involved quality control does not necessarily render them production workers. Nor should the employees in this case necessarily be considered production workers simply because other gaugers performing similar tasks in other settings would be regarded as part of the production process. If, for example, the independent producers and the pipeline company had both employed gaugers to test the crude oil—the producers using the gaugers to test the oil before the producers placed it on the market and the pipeline company using the gaugers to ensure that the oil that was offered for purchase was of the requisite quality and quantity—it would be reasonable to characterize the first set of gaugers as part of the production process and the second set of gaugers as part of the purchase and transportation process, even though the work they did would be identical. In this case, the Secretary found that the gaugers were performing work that fit within the second category, and the employees have not offered any evidence to the contrary. Indeed, a representative of one of the gaugers proffered that the gauger would determine "whether the crude oil produced was of such a quality as to be purchased by Marathon Oil Company and transported into the pipe line maintained by Marathon

---

applicable. See Mead, 533 U.S. at 234-35. As an initial matter, the government has not addressed the criteria for applying full Chevron deference and whether the application of those criteria suggest giving Chevron deference to the Secretary's investigative determinations. Moreover, it is not entirely clear what it is that the government wishes us to defer to. The Secretary did not explicitly construe the term "production" in the adjustment assistance statute, but instead merely concluded that the plaintiff employees, and thus their firm, were not involved in the production of crude oil. In any event, regardless of whether it is appropriate to accord Chevron or Skidmore deference to an unarticulated, implicit construction of the term "production," that issue has no effect on the disposition of this case, because we would reach the same result in this case with or without deference.

Ashland Pipe Line LLC," which is consistent with the Secretary's conclusion that the gaugers were not part of the production process. Thus, we believe the Secretary's conclusion that Marathon Ashland Pipe Line and its gauger employees were not engaged in "producing" crude oil was supported by substantial evidence. See 19 U.S.C. § 2395(b) ("findings of fact by the Secretary of Labor . . . , if supported by substantial evidence, shall be conclusive").

With respect to the court's second ground of decision, we do not believe that the 1988 amendments to the adjustment assistance statute require that the gaugers' work be regarded as part of the production process. The 1988 amendments added a new subsection to section 2272 that was directed at the oil and gas industry. The new subsection stated that any firm or subdivision that engages in exploration or drilling for oil or natural gas "shall be considered to be a firm producing oil or natural gas," 19 U.S.C. § 2272(b)(2)(A) (2000), and that any firm or subdivision that engages in exploration or drilling for oil or natural gas, "or otherwise produces oil or natural gas, shall be considered to be producing articles directly competitive with imports of oil and with imports of natural gas," id. § 2272(b)(2)(B). The trial court concluded that the 1988 amendments were intended "to enlarge a restricted interpretation of what it means to produce oil," and that Congress intended for employees such as the gaugers in this case to be eligible for adjustment assistance benefits.

We disagree with the court's conclusion that the 1988 amendments indicate that Congress intended to extend the definition of "production" in the context of the crude oil and natural gas industry to include activities such as gauging. In fact, we draw the opposite inference.

Section 1421 of the Omnibus Trade and Competitiveness Act of 1988 amended section 2272, inter alia, by adding subsection (b):

> (b) For purposes of subsection (a)(3)—
>
> . . . .
>
> (2) (A) Any firm, or appropriate subdivision of a firm, that engages in exploration or drilling for oil or natural gas shall be considered to be a firm producing oil or natural gas.
>
> (B) Any firm, or appropriate subdivision of a firm, that engages in exploration or drilling for oil or natural gas, or otherwise produces oil or natural gas, shall be considered to be producing articles directly competitive with imports of oil and with imports of natural gas.

Pub. L. No. 100-418, 102 Stat. 1107, 1242-44 (1988). The amendment broadened section 2272 to cover workers in firms that engage in the exploration or drilling for oil or natural gas. Significantly, however, the amendment did not cover all services ancillary to the production process generally. Thus, there is no indication that Congress sought to include work such as gauging, which takes place after exploration and drilling have concluded and the crude oil has been extracted.

The trial court concluded that the legislative history evidenced an intent by Congress to read "production" expansively, and that, in the spirit of the legislative history, gaugers should fit into the definition. However, the legislative history shows that the 1988 amendments were intended only

to effect a limited expansion of the definition of production. The House Conference Report explains that a Senate amendment would have expanded eligibility to all workers and firms in the oil and natural gas industry, including workers and firms who supply essential services to firms in the industry. H.R. Conf. Rep. No. 100-576, at 694 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1727. The conference agreement, however, replaced that proposed amendment with a substitute amendment extending eligibility only to workers and firms engaged in exploration and drilling. Id. The Conference Report explained that the purpose of the amendment was to address a discrepancy in the law, whereby "workers employed by [firms engaged only in the exploration and/or drilling for crude oil and natural gas] have been denied program benefits" while "workers engaged in exploration or drilling for firms that also produce crude oil or natural gas are considered as eligible to apply for such benefits." Id. The Conference Report also gave examples of what the conferees regarded as firms that are engaged in the exploration or drilling of oil: "For the purposes of this amendment, the conferees consider firms engaged in exploration or drilling to include, for example, independent drillers, pumpers, seismic and geophysical crews, geological crews, and mud companies." Id. Thus, the rejection of a broader amendment that would have covered employees such as gaugers in favor of a narrower amendment covering only workers involved in exploration and drilling is strong evidence that Congress did not intend to broaden the definition of the term "production" beyond the particular activities referred to in the amendment.

Another section of the 1988 Act provides further support for the Secretary's conclusion that the statutory term "production" should not be read broadly to encompass work consisting of providing essential goods and services for the production of articles. Section 1421(b)(1) of the 1988 Act extended adjustment assistance not only to workers in firms

that produce goods that compete with imported goods, but also to workers in any firm that "provides essential goods or essential services" for the production of such goods. Pub. L. No. 100-418, § 1421(b)(1), 102 Stat. 1243-44. Although that section of the Act might well have covered the employees in this case, it never became effective because the statute provided that section 1421(b)(1) would become effective only after a certain additional import fee went into effect, see id. § 1430(d), 102 Stat. 1257. That fee, in turn, never went into effect because Congress made its effectiveness subject to Presidential rejection, see id. § 1430(b), 102 Stat. 1256, and the President declined to make the fee effective, see Presidential Determination No. 90-34 of August 23, 1990, 55 Fed. Reg. 34,889 (Aug. 24, 1990). To interpret the term "production" to include work consisting of the provision of services that are essential to the production of articles, but do not constitute the actual production of articles, would in effect be to treat the "essential goods and services" provision of the 1988 Act as if it had become law, when in fact it did not.

The reasoning of the court in Former Employees of Permian Corp. v. United States, 718 F. Supp. 1549 (Ct. Int'l Trade 1989), is instructive on this point. In Permian, the petitioners were former employees of a company that transported and sold domestic crude oil. Id. at 1550. Relying on the legislative history of the 1988 amendments, the Permian court ruled that transportation of crude oil was not part of the production of crude oil. Id. Rather, the court stated that "the legislative history of this amendment indicates that it is intended to apply to a distinct category of workers, namely those working for companies involved in locating and extracting oil from the ground, and not more generally to any workers in related industries who may have been adversely affected in some way by oil imports." Id. at 1551.

In sum, we do not agree with the trial court that the Secretary committed legal error in defining the statutory term "production" and applying that term to the facts of this case. Based on the evidence in the administrative record, we agree with the government that there was substantial evidence to support the Secretary's fact-intensive determination that the plaintiff employees, who worked for a transportation company and who tested crude oil produced by independent producers incident to its sale and transportation, were not engaged in "production" within the meaning of the adjustment assistance statute, and that their firm therefore did not "produce" crude oil.[3]

III

The employees make the additional argument that the Secretary did not conduct an adequate investigation in this case, a conclusion with which the trial court concurred. The trial court acknowledged that "unverified statements from company officials in a position to know about the company's products and business decisions can be relied upon when there is no other evidence in the record to contradict or cast doubt upon those statements." In this case, however, the court held that "evidence presented by the petitioning workers stating that they were involved in more than the mere transportation

---

[3] The trial court adverted to, but did not decide, the question whether the industry at issue should be characterized as producing refined petroleum products rather than crude oil, in which case the plaintiff employees would be engaged in a single production process beginning with exploration and ending with the refining process. The employees cannot prevail on that ground, however, because the adjustment assistance statute requires that the loss of the workers' jobs be attributable to "increases of imports of articles like or directly competitive with articles produced by such workers' firm," 19 U.S.C. § 2272(a)(3) (2000), and the imports at issue in this case were imports of crude oil, not imports of refined petroleum products.

of crude oil, directly contradicts the company officials' conclusions." Former Employees of Marathon Ashland Pipeline, LLC v. Chao, 215 F. Supp. 2d at 1352-53 (citations omitted); accord Former Employees of Marathon Ashland Pipeline, LLC v. Chao, 277 F. Supp. 2d at 1311-12.

The Secretary is entitled to base an adjustment assistance eligibility determination on statements from company officials if the Secretary reasonably concludes that those statements are creditworthy and are not contradicted by other evidence. See Former Employees of Barry Callebaut v. Chao, 357 F.3d 1377, 1383 (Fed. Cir. 2004). The Secretary based her findings in this case on statements from Marathon Ashland Pipe Line to the effect that Marathon Ashland Pipe Line was engaged in the transportation of crude oil rather than its production, and that the employees performed their quality control functions after the crude oil was extracted but before it was shipped. Although the employees contend that they were involved in the production of crude oil and made that argument in their submissions at the administrative stage of the case, they have not pointed to any evidence that contradicts the factual characterizations of their role in the process, as set forth in the statements by representatives of Marathon Ashland Pipe Line. Instead, they argue generally that quality control performed by gaugers is a production function, and that quality control is necessary and essential to the production of crude oil. As we explained above, the Secretary was entitled to find that the production of crude oil does not include the quality control function performed by the gaugers in this case. Therefore, the statements from Marathon Ashland Pipe Line that it is engaged in the transportation of oil, and that the gaugers perform a quality control function on the oil before it is transported constituted substantial evidence on which the Secretary was entitled to base her determination that the employees were ineligible for adjustment assistance benefits. There was no conflict over the underlying facts in

the evidence before the Secretary that precluded the Secretary from relying on the representations by the employer or required that the Secretary take further investigative steps before making her certification decision.

IV

As we noted above, the government argues that even if the trial court was correct that substantial evidence did not support the Secretary's determination, the remedy ordered by the court—a direction to the Secretary to certify the employees for benefits—was beyond the court's statutory authority. According to the government, 19 U.S.C. § 2395(b) authorizes the Court of International Trade to remand an adjustment assistance case to the Secretary to take further evidence, but it does not authorize the court to direct the Secretary to certify the plaintiff employees as eligible for adjustment assistance. The government also points to another statute, 28 U.S.C. § 2643(c)(2), which provides that the Court of International Trade "may not grant an injunction or issue a writ of mandamus in any civil action commenced to review any final determination of the Secretary of Labor" in an adjustment assistance case. According to the government, that statute prohibits the court from directing the Secretary to certify employees for adjustment assistance. Because we reverse the trial court's ruling that the Secretary's negative determination is not supported by substantial evidence, we have no occasion to address the government's argument that the remedy ordered by the trial court was outside the authority granted to the court under 19 U.S.C. § 2395 and contrary to the restriction on the court's authority found in 28 U.S.C. § 2643(c)(2). See Former Employees of Barry Callebaut, 357 F.3d at 1383.

Each party shall bear its own costs for this appeal.

REVERSED.

Supreme Court, U.S.
FILED
DEC 10 2004
OFFICE OF THE CLERK

No. 04-397

In the Supreme Court of the United States

FORMER EMPLOYEES OF MARATHON ASHLAND PIPE LINE, LLC, PETITIONER

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DAVID M. COHEN
JEANNE E. DAVIDSON
CLAUDIA BURKE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Secretary of Labor's determination that petitioners were not involved in the production of a good within the meaning of the Trade Act of 1974 is supported by substantial evidence and is otherwise in accordance with law.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)	6
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944)	6

Statute:

Trade Act of 1974, Pub. L. No. 93-618, Tit. II, 88 Stat. 2019 (19 U.S.C. 2251 *et seq.*)	1
19 U.S.C. 2271(a)	2
19 U.S.C. 2272	5
19 U.S.C. 2272(a)(3)	5
19 U.S.C. 2395(b)	2, 6

In the Supreme Court of the United States

No. 04-397

FORMER EMPLOYEES OF MARATHON ASHLAND PIPE LINE, LLC, PETITIONER

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-24a) is reported at 370 F.3d 1375. The opinion of the Court of International Trade (Pet. Supp. App. 24-52) is reported at 277 F. Supp. 2d 1298.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2004 (Pet. App. 1a). A petition for a writ of certiorari was filed on September 9, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. Chapter 2 of Title II of the Trade Act of 1974 (Trade Act), Pub. L. 93-618, 88 Stat. 2019 (19 U.S.C.

2251 *et seq.*), offers certain forms of adjustment assistance to employees involved in the production of a good who lose their jobs because of competition from imported goods. The Act is administered by the Secretary of Labor. Upon receipt of a petition requesting assistance, the Secretary initiates an investigation. 19 U.S.C. 2271(a). Following the investigation, the Secretary makes a determination on a petitioner's eligibility. On judicial review, the Secretary's determination must be sustained if it is supported by substantial evidence and is otherwise in accordance with law. 19 U.S.C. 2395(b).

2. Petitioners are eight former employees of Marathon Ashland Pipe Line (Marathon Ashland). Pet. App. 4a. Marathon Ashland is a subsidiary of Marathon Ashland Petroleum LLC, a partnership owned by Marathon Oil Company and Ashland Inc. *Ibid.* Petitioners worked as gaugers in Bridgeport, Illinois. As gaugers, they tested crude oil that came from independent producers. Once tested and verified for quality, the crude oil was then transported to third-party purchasers or to the parent company's refinery in Robinson, Illinois. *Ibid.* In 1999, the division of Marathon Ashland for which petitioners worked was sold and petitioners lost their jobs. *Ibid.*

Petitioners filed a claim with the Secretary of Labor seeking assistance under the Trade Act. Pet. App. 4a. Petitioners alleged that they had lost their jobs because their company's parent company had increased its importation of crude oil. *Id.* at 5a.

Following an investigation, the Secretary determined that petitioners were not eligible for adjustment benefits. Pet. App. 5a. The Secretary explained that only employees involved in the production of a good are eligible for assistance under the Trade Act and that

petitioners transported crude oil and did not produce it. *Ibid.* Petitioners sought reconsideration, which was denied. *Id.* at 6a. The Secretary rejected petitioners' reliance on the 1988 amendments to the Trade Act of 1974, which extended coverage to workers engaged in exploration and drilling for crude oil. The Secretary reasoned that the amendments did not extend coverage to workers who transport crude oil after drilling. *Ibid.*

3. Petitioners sought judicial review of the Secretary's decision in the Court of International Trade. Pet. App. 7a. The Secretary sought a remand to conduct further investigation, and the court granted that request. *Ibid.* After completing that investigation, the Secretary again denied benefits under the Trade Act. *Ibid.* Petitioners renewed their action before the Court of International Trade and moved for judgment in their favor. *Ibid.* The court determined that the Secretary's decision was not supported by substantial evidence. *Id.* at 7a-8a; Pet. Supp. App. 53a-72a. The court remanded for a further inquiry into whether petitioners produced an article within the meaning of the Trade Act. Pet. App. 8a.

On remand, the Secretary again found petitioners ineligible for adjustment assistance, Pet. App. 9a-10a, and, on review, the Court of International Trade again held that the Secretary's determination was not supported by substantial evidence. *Id.* at 10a; Pet. Supp. App. 24a-52a. The court determined that petitioners were involved in the production of crude oil because crude oil is not sold or transported until after gaugers evaluate its quality. Pet. App. 10a. The court also concluded that the expansion of the definition of production in the 1988 amendments to include exploration and drilling showed that gaugers also should be understood

as producers. *Id.* at 11a. The court certified petitioners as eligible for adjustment benefits. *Ibid.*

4. The court of appeals reversed. Pet. App. 2a-24a. The court concluded that the question whether an employee is involved in transportation or production when the employee's work is performed "at the interface" between the two activities should be resolved "on the particular facts of the case, such as how the sale and transportation transactions were arranged and whether the employees were serving as agents of the producer/seller or of the purchaser or transporter." *Id.* at 15a. Because petitioners were employed by a transportation company, and not a production company, the court determined that it was "reasonable for the Secretary to conclude that [petitioners] were not involved in the production process but were serving as buyers' agents." *Id.* at 16a. The court also noted that petitioners had not offered any evidence that undercut the Secretary's determination. Pet. App. 16a. To the contrary, a representative of petitioners had offered evidence that "the gauger would determine 'whether the crude oil produced was of such a quality as to be purchased by Marathon Oil Company and transported,'" evidence that was fully consistent with the Secretary's determination. *Id.* at 16a-17a (citation omitted).

The court of appeals also held that petitioners were not eligible for benefits under the 1988 amendments. The court noted that the amendments expanded the definition of "production" to include a firm that engages in "exploration or drilling" and that petitioners were not involved in exploration or drilling. Pet. App. 17a-18a.

ARGUMENT

Petitioners seek review of the Secretary's determination that they were not eligible for assistance under the Trade Act because they were not involved in the production of a good. As the court of appeals correctly held, however, the Secretary's determination is consistent with the terms of the statute and is supported by substantial evidence. Petitioners' fact-bound challenge to the Secretary's determination does not warrant review.

1. Under the terms of the Trade Act, employees qualify for assistance only if they have worked for a firm that has "produced" an article. 19 U.S.C. 2272(a)(3). Petitioners did not satisfy that eligibility requirement. Petitioners' employer, Marathon Ashland, did not produce oil. Rather, it performed the service of transporting oil that had previously been extracted by independent producers. Moreover, petitioners were employed to assist in that transportation service, not to produce oil. Petitioners tested oil produced by independent operators, and they did so to facilitate its transportation. Pet. App. 14a. The Secretary therefore reasonably determined that petitioners were not eligible for assistance under the Trade Act.

2. Petitioners contend (Pet. 9) that the Secretary could not resolve this case without first defining the term "production." But the Secretary was not required to adopt one all-encompassing definition of production. To the contrary, the statute expressly contemplates that the Secretary may proceed on a case-by-case basis to determine whether particular claimants are eligible for assistance under the Act. 19 U.S.C. 2272. Moreover, as this case illustrates, the Secretary is fully capable of resolving questions of eligibility on a reasoned

basis without adopting an all-encompassing definition of production. To decide this case, it was sufficient for the Secretary to conclude that a firm that transports oil produced by independent producers is not involved in the production of crude oil.

3. Petitioners next contend (Pet. 14) that the court of appeals did not engage in an appropriate review of the Secretary's determination. That contention is without merit. The statutory review provision requires a court of appeals to sustain the Secretary's determination when that determination is supported by substantial evidence and is otherwise in accordance with law. 19 U.S.C. 2395(b). The court of appeals faithfully applied that standard of review: it held that the Secretary did not err in interpreting the term production to exclude a firm that engages in the transportation of crude oil extracted by independent producers; and it held that substantial evidence supported the Secretary's determination that petitioners' firm was such a transportation firm. Pet. App. 14a-17a, 21a. There is therefore no merit to petitioners' claim that the court of appeals did not engage in an appropriate review of the Secretary's determination.

Nor did the court of appeals err in failing to decide whether the Secretary's interpretation was entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). See Pet. 12. As the court of appeals explained, it would have reached the same conclusion regardless of which of those two standards applies. Pet. App. 16a n.2. There was therefore no need for the court of appeals to resolve the question whether the Secretary's interpretation should be given deference under *Chevron* or *Skidmore*.

4. Finally, petitioners argue (Pet. 15) that the evidence that they presented was sufficient to establish that they were involved in the production of crude oil. But petitioners' showing (*ibid.*) that, absent their approval, no crude oil could be transported, demonstrates only that they played an important role in the transportation process; it does not establish that they were involved in the production of crude oil. Moreover, petitioners submitted evidence that their job was to test whether crude oil that had already been produced was ready for transportation and sale. Pet. App. 16a. As the court of appeals explained, that evidence is fully consistent with the Secretary's determination that petitioners were not involved in the production process. *Id.* at 16a-17a. In any event, petitioners' fact-bound challenge to the Secretary's determination does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General
PETER D. KEISLER
Assistant Attorney General
DAVID M. COHEN
JEANNE E. DAVIDSON
CLAUDIA BURKE
Attorneys

DECEMBER 2004